United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-5024

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-5024

HARVEY R. MILLER, as Trustee in Bankruptcy of Ira Haupt & Co., a Limited Partnership, Bankrupt,

Plaintiff-Appellant,

v.

NEW YORK PRODUCE EXCHANGE, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York
Civil Action No. 66-1016 (RLC)

SUPPLEMENTAL FACT BRIEF OF DEFENDANTS NEW YORK PRODUCE EXCHANGE, DONALD V. MacDONALD, SIDNEY FASHENA AND I. USISKIN & CO.

Owens, Connelly, Chase,
O'Donnell & Weyher
Attorneys for Defendants
New York Produce Exchange,
Donald V. MacDonald,
Sidney Fashena and
I. Usiskin & Co.
299 Park Avenue
New York, New York 10017

Of Counsel:
John Logan O'Donnell
Judith S. Kaye
Robert W. Boyd, Jr.
Joseph C. Kaplan

TABLE OF CONTENTS

CITATION

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-5024

HARVEY R. MILLER, as Trustee in Bankruptcy of Ira Haupt & Co., a Limited Partnership, Bankrupt,

Plaintiff-Appellant,

v.

NEW YORK PRODUCE EXCHANGE, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
CIVIL ACTION NO. 66-1016 (RLC)

SUPPLEMENTAL FACT BRIEF OF DEFENDANTS NEW YORK PRODUCE EXCHANGE, DONALD V. MacDONALD, SIDNEY FASHENA AND I. USISKIN & CO.

Preliminary Statement

This brief, supplementing the joint brief of all defendants, treats additional facts relating particularly to the New York Produce Exchange (the "Exchange"), Donald V. MacDonald ("MacDonald"), Sidney Fashena ("Fashena"), and his firm I. Usiskin & Co. ("Usiskin").

Plaintiff attacks all defendants as faithless "trader-regulators", who profited both in their own futures trading and in commercial dealings with DeAngelis or his corporate personalities (collectively "Allied"). This claim has no basis in fact or law, as demonstrated in defendants' joint brief. More precisely, however, the particular defendants herein had no self-interest in improperly regulating the Exchange. They had no conflict arising out of any personal trading; they had no dealings of any sort with Allied; they never participated in any ex-pit transactions; and they did not stand to profit in any way from the actions complained of.

The case plaintiff says he presented or should have been permitted to present to the jury consists in large measure of acts allegedly committed by other defendants or knowledge gained by them in the course of their own commercial dealings, and not in the performance of their duties as officers or directors of the Exchange. Any such bad faith or knowledge held privately by a member of the Board of Managers could not be imputed to the Exchange or to any of the defendants herein.

Supplemental Facts

A. Donald V. MacDonald

It is clear that MacDonald was guilty of neither negligence nor bad faith.

By 1963, when he was President of the Exchange, MacDonald had spent 30 years—his entire business career—in commodities futures trading. Formerly a partner in two brokerage firms, he was in 1963 a salaried employee of Fahnestock & Co., as Manager of its Commodities Department (MacDonald, JA 626a-627a).* Mac-

---

* Citations to the record below are made by reference to the appropriate pages of the Joint Appendix, designated herein as "JA".

Donald became a member of the Exchange in the middle 1940's, and was first elected to its Board of Managers during the 1950's. In 1961 he was elected Vice President, and was in his second term as President when this debacle overtook the Exchange. MacDonald served the Exchange without compensation, as did all of its officers and directors (MacDonald, JA 629a; PX 55 § 12, JA 271.5e).

MacDonald never in his entire long career traded cottonseed oil futures for himself, nor did the firm which employed him (MacDonald, JA 628a). He had no dealings of any sort with Allied. MacDonald thus had no motive for acting in bad faith as charged, and plaintiff has suggested no other believable reason why MacDonald should deliberately act to injure Haupt or the market.

MacDonald was indisputably a man of great experience in commodities trading and, as the court below found, "an active, well-informed Exchange President." *Seligson* v. *New York Produce Exchange*, 378 F. Supp. 1076, 1101 (S.D.N.Y. 1974). He was alert to any sign of a corner, squeeze, manipulation or threat to an orderly market. In 1963, he found none (MacDonald, JA 638a-643a). Having witnessed the market in 1963 as an experienced trader without any self-interest, MacDonald completely discounted the "warning-signs" theory concocted by plaintiff's expert witnesses (MacDonald, JA 538a, 540a, 644a-648a).

During 1963, MacDonald several times initiated inquiries, when he had questions about behavior of the market, and he was fully satisfied by the information and reports he received.

It was at his direction that Berg asked the CEA for Allied's position in June or July 1963 (MacDonald, JA 520a; Berg, JA 780a); MacDonald was naturally reassured when Berg reported back that the CEA felt circumstances did not warrant its releasing that information (MacDonald, JA 523a, 635a). It was at MacDonald's direction that Berg was sent to see Haupt, in order to inquire about

Haupt's handling of the Allied and other commodities accounts (MacDonald, JA 524a-525a). Berg reported back to MacDonald that Haupt said it had ample protection, was getting more margin than the Exchange cash requirement, and had even additional collateral (MacDonald, JA 531a). It was at MacDonald's direction that Berg approached Allied directly for confirmation of what Haupt had told Berg regarding the legitimacy of the trades and that there was adequate protection (MacDonald, JA 534a; Berg, JA 776a). Allied indeed confirmed this (MacDonald, JA 542a-544a). It was at MacDonald's direction that Berg followed up on checking the legitimacy of ex-pit trades with the commission houses involved (MacDonald, JA 541a, 646a).

The Managing Director, Carl R. Berg—the only full-time paid executive of the Exchange—was under Exchange bylaws specifically responsible for conducting just this sort of inquiry requested by the President (MacDonald, JA 508a; PX 55 § 23(a), JA 278e). Berg had been an executive of the Exchange since 1947 (MacDonald, JA 632a-633a), and was regarded as a conscientious, trustworthy official (*e.g.*, McMinn, JA 894a). MacDonald properly accepted Berg's reports.

When coupled with MacDonald's own disinterested observation of the market behavior during 1963, Berg's inquiries and reports prior to November 14, 1963, gave MacDonald no cause for greater concern, investigation or action.

On November 14, 1963, MacDonald learned that the CEA had furnished a report to the Exchange showing that Allied held an enormously large long position in cottonseed oil futures. Even the revelation on November 14 that Allied held the predominant long position did not foreshadow catastrophe. MacDonald had no reason to doubt that Allied had acquired the contracts because it had a legitimate need for them. He knew, from his earlier inquiries of both Haupt and the CEA, that Allied was a hedger (Mac-

Donald, JA 666a-667a). MacDonald also had obtained, through his inquiry, Haupt's direct assurance that it was well protected, with excess cash margins and excess collateral.

There is no evidence of any bad faith or negligence in MacDonald's conduct from the appointment of a control committee on November 14 through the final closing of the Exchange on November 20. The record of MacDonald's day-to-day activities, set out in defendants' joint brief, establishes that he was, throughout, a careful executive, exercising his best business judgment in the circumstances presented. As in the prior period, he had no profit motive or self-interest.

This, and the fact that the actions he took in light of the information he had were clearly reasonable, fully supported the finding in his favor.

B. Sidney Fashena

Fashena was the only defendant to be granted summary judgment as to Count Two (the antitrust claim) and as to all averments of bad faith regulation in Count One (Commodity Exchange Act claim), rulings which are not attacked on this appeal. *Seligson* v. *New York Produce Exchange, supra.* As the court below found, Fashena lacked access to a broad range of nonpublic market information; he was a peripheral figure in the events challenged; and his firm's position (including a small personal speculative account) was not predominantly long or short but at all times close to even. *Id.* at 1103-04. He had no dealings whatever with Allied. He was not, in short, a "trader-regulator" in the nefarious sense of plaintiff's brief.

The jury's verdict exonerated Fashena as to the remaining claim of negligence.*

---

* As discussed in the joint brief, negligence alone is not even sufficient to support a judgment against an exchange director in favor of a member for improper regulation.

Fashena in 1963 was one of two partners in a small trading firm, I. Usiskin & Co. He had been in commodities futures trading and a member of the Exchange for 25 years (Fashena, JA 963a). He was a close observer of the market in 1963; in his 25 years on the Exchange, as a floor trader he was on the floor daily and absented himself as little as possible (Fashena, JA 898a, 962a). His specialty was fats and oils, particularly analysis of price movements (Fashena, JA 897a, 968a). Indeed, of all the witnesses who testified at trial—the experts and the eyewitnesses alike—Fashena was the only one who did daily, intensive price analysis of the market in 1963 (Fashena, JA 900a). Therefore, his testimony on the subject of manipulation and market behavior had particular importance.*

During 1963, Fashena observed no corner, squeeze or manipulation, and no attempted corner, squeeze or manipulation (Fashena, JA 965a). He studied prices on the Exchange very carefully, found them to be reasonable both in themselves and in relation to comparable oils (Fashena, JA 912a), and fluctuating normally (Fashena, JA 909a). Supply of cotton seed oil was comfortable (Fashena, JA 966a). Fashena saw no abnormality and, drawing on his long experience in the market, he *sensed* no abnormality (Fashena, JA 967a).

Plaintiff's expert witnesses, studying statistics for the litigation with twelve years of hindsight, felt that certain market factors should have been "warning signs" prior to November 14. But Fashena—with 25 years of day-to-day experience on the Exchange and with no self-interest or bad faith—read those "signs" in the context of the operating market and concluded that the market was behaving normally and even strongly (Fashena, JA 911a, 968a-974a).

---

* Price analysis is an essential aspect of a manipulation (Dahl, JA 262a; Gray, JA 1752a-1753a; Fashena, JA 966a). Plaintiff's experts did no price analysis. The only persons who actually analyzed the 1963 prices were Fashena, contemporaneously, and the CEA, shortly afterwards (DX 1A, JA 9[illegible]e-981e), and both concluded that there was no price artificiality.

7

In September 1963, Fashena met informally with Berg, MacDonald, the Clearing Association President and its Managing Director. The Clearing Association presented both a problem (a concern about concentration) and a solution (scaled-up margin requirements). As Fashena recalled, the Exchange said it would go along with anything the Clearing Association perceived appropriate to deal with the problem, and the escalated margins proposed by the Clearing Association seemed a sensible, intelligent solution (Fashena, JA 921a-929a). Fashena also noted that the Clearing Association delayed five weeks before putting these new margins into effect, further indicating that no crisis existed. To say, as plaintiff does, that Fashena or MacDonald received and ignored any specific warnings or that they concurred in the proposed solution "only after it was agreed that it would not hurt the booming volume of business on the Produce Exchange" (Brief, p. 33) substitutes sarcasm for fact and is entirely untrue.

Haupt's activity in the market in 1963 was an additional assurance to Fashena. Fashena knew and trusted Haupt so well that he maintained his own personal security account with Haupt (Fashena, JA 979a-980a); he even sponsored the application of Ira Haupt for membership on the Exchange (Fashena, JA 980a). From long personal experience, Fashena knew Haupt as a reliable broker that would be well protected in handling accounts and would be sure to know its customer (Fashena, JA 980a-981a). With no particular cause for concern brought to his attention, it was hardly negligence for Fashena to accept that Haupt, as broker for Allied, was operating within the limits of the law and within the realm of good sense.

No acts or omissions are cited in the brief—nor were any shown at trial—to support plaintiff's rhetoric about Fashena's culpability as a director either in the period prior to November 14 or after November 14.

Fashena attended the Exchange Board meetings between November 14 and November 19, and satisfied himself that appropriate action was being taken to meet the situation presented. He supported the appointment of a control committee to send out a position call, which he felt would effectively deal with a problem of concentration by permitting voluntary redistribution of positions (Fashena, JA 983a). He acted fairly and responsibly when confronted with Haupt's predicament on November 19, and when he participated in working out a settlement price that would be equitable to all concerned (Fashena, JA 940a, 986a). He had no personal interest or profit in acting as he did.

It cannot be said that Fashena was negligent in any respect. Drawing on his experience, he perceived no cause for inquiry from the operation of the market, and no concern was expressed to him by anyone else upon which he should have acted.

C. I. Usiskin & Co.

Plaintiff's quest for anyone else to blame for Haupt's own misconduct is exemplified by his continuing battle against I. Usiskin & Co., a two-man partnership which has been defunct for ten years. Fashena's freedom from negligence and bad faith also exculpates his firm, which is sued on a theory of vicarious liability.

Plaintiff's repeated assertion that Usiskin (among the other company defendants) profited from any improper regulation (Brief, pp. 35, 42-43, 99) is patently false. Nor is there any evidence that Usiskin profited directly or indirectly from any activity of Fashena on the Board of the Exchange.

Contrary to plaintiff's statements (Brief, pp. 5, 96-98), Fashena did not "represent" Usiskin on the Board. The Exchange bylaws directed that nominees for the Board of Managers be fairly apportioned among the various trade

interests in the Exchange (PX 55, § 7, JA 271.3e-271.4e). Fashena was nominated as a representative of small independent clearing members, but his election to and service on the Board were on behalf of the membership of the Exchange and not any particular firm or trade interest (MacDonald, JA 662a).

Usiskin itself had no dealings with Allied and no ex-pit transactions. It had no self-interest in improper regulation of the market. The position of the firm, at best no more than twenty contracts (Haupt's position exceeded 8,000 cottonseed oil contracts), was, during the critical period in this litigation, just about even (Fashena, JA 935a). Plaintiff's efforts to attribute a profit motive or bad faith regulation to Usiskin are baseless.

Conclusion

By 1963, MacDonald and Fashena together had more than fifty years' experience in the commodities business, and voluntarily contributed many years of devoted service as directors or officers of the Exchange. Their reward was to be accused by one of the arch-wrongdoers in the Salad Oil Swindle and dragged through ten years of litigation.

They were completely vindicated by the judge and jury, and that judgment should be affirmed.

June 11, 1976

Respectfully submitted,

OLWINE, CONNELLY, CHASE,
O'DONNELL & WEYHER
Attorneys for Defendants
New York Produce Exchange,
Donald V. MacDonald,
Sidney Fashena and
I. Usiskin & Co.
299 Park Avenue
New York, New York 10017

Of Counsel:
JOHN LOGAN O'DONNELL
JUDITH S. KAYE
ROBERT W. BOYD, JR.
JOSEPH C. KAPLAN

(2) COPY RECEIVED

AUG 6 1976

BROWN, WOOD, IVEY, MITCHELL & PETTY

Attorneys for Lyndon H. Hickman

(2) COPY RECEIVED

8/6 1976

PAUL WEISS, RIFKIND, WHARTON & GARRISON

By

(2) COPY RECEIVED

WEIL, GOTSHAL & MANGES

Attorneys for Lee Appellant

Date 8/6/76 11:45

COPY RECEIVED

AUG 6 1976

GEWIN, BALLANTINE, BONNEY, FALLON & ROSS

Attorneys For: Burger & Walter C. Klein